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In The

Supreme Court of the United States

October Term 1995

WILLIAM RAFFERTY, ET AL.

Petitioners

v.

CITY OF YOUNGSTOWN

Respondent

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. A writ of certiorari should not be granted where Petitioners do not have standing to challenge a valid consent decree and are attempting to collaterally attack the decree in this separate action.

II. A writ of certiorari should not be granted where Petitioners do not have standing to challenge a consent decree as at all stages of the judicial proceedings involving the consent decree Petitioners had notice and meaningful opportunity to be heard.

III. A writ of certiorari should not be granted where Petitioners were adequately represented in the stipulated settlement agreement and the current matter amounts to no more than an impermissible collateral attack on a valid consent decree.

IV. A writ of certiorari should not be granted where, due to the facts of this specific case, Petitioners cannot show an independent cause of action.

V. A writ of certiorari should not be granted where, based on the facts of this specific matter, summary judgment was correctly granted Respondent City.

PARTIES INVOLVED

Respondent City is satisfied with Petitioners listing of the parties herein with the exception that the City of Youngstown has been represented by Cheryl Waite, First Assistant Director of Law, in all appellate matters.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent City of Youngstown respectfully requests this honorable Court deny a writ of certiorari and dismiss the Petition.

LOWER COURT OPINIONS

Respondent City is generally satisfied as to Petitioners recitation of the lower court opinions.

STATEMENT OF JURISDICTION

Discretionary jurisdiction of this Court arises under 28 U.S.C. §1254(1).

Respondent respectfully requests that this Court not exercise its discretionary jurisdiction where Petitioners in reality seek only a review of the particular factual issues in this present case which have no exceptional importance to development of the law.

STATUTES INVOLVED

Petitioners list and cite to the federal laws they believe are involved herein.

STATEMENT OF THE CASE

On June 27, 1989, Petitioners, all Youngstown Police Officers, filed a complaint alleging "reverse discrimination" allegedly in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f) and 28 U.S.C. §§1331 and 1343. Petitioners also invoked jurisdiction under 42 U.S.C. §1983 and 1988, and 28 U.S.C. §§2201 and 2202 for purposes of declaratory judgment, seeking to have the court determine that the City's compliance with a 1981 Consent Decree violated Petitioners' civil rights.

On June 29, 1989, Petitioners moved for an emergency temporary restraining order (TRO) to prevent Respondent City from promoting certain black police officers

through its ranks. On that same day, the honorable Thomas Lambros, Judge of the District Court, Northern District of Ohio, conducted a telephone conference upon this motion. The motion was entirely based upon Petitioners allegations that the promotions violated the previously mentioned consent decree.

This decree was signed in another case Judge Lambros presided over, Williams v. Vukovich, Case Number C76-6Y (N.D. Ohio), a matter which evolved over some ten years of litigation. Petitioners bargaining agent, FOP Lodge #28, was a party to the Williams litigation and was actively involved in the formulation of the consent decree and in resolving the later matters involving implementation of the decree.

The district court denied Petitioners' motion for a temporary restraining order on July 13, 1989, and Petitioners attempted an interlocutory appeal. The Court of Appeals for the Sixth Circuit dismissed the appeal, stating that the denial was not immediately appealable. On February 19, 1993, Petitioners filed motions for a preliminary injunction and for summary judgment. On June 18, 1993, Respondent filed a motion for summary judgment. The preliminary injunction issue came up for a hearing on June 24, 1993, at which time the district court allowed counsel to address all motions pending, and the court took the matter under advisement. With respect to the parties' opposing summary judgment

motions, the court held a telephone conference on July 1, 1993, whereby the parties agreed to file a list of issues, a stipulation of facts and exhibits.

Based on Petitioners' lack of standing to challenge the Williams consent decree, a conclusion drawn from the above stipulations and exhibits, the district court denied Petitioners' motion for summary judgment and granted Respondent City's motion, thereby disposing of the entire matter.

Petitioners appealed the district court decision to the United States Court of Appeals for the Sixth Circuit, which court unanimously affirmed the district court decision.

I. A writ of certiorari should not be granted where Petitioners do not have standing to challenge a valid consent decree and are attempting to collaterally attack the decree in this separate action.

Petitioners have continued throughout these proceedings to ignore established labor law and by so doing believe they can ignore the court sanctioned implementation of the Williams consent decree. Unfortunately for Petitioners, they were assigned to the very district court judge who presided over the Williams litigation, which judge recognized that Petitioners were actually attempting to collaterally attack the decree.

Petitioners start out by admitting that the 1986 Williams consent decree is valid. They claim not to be attacking the decree itself, merely the implementation of the decree. Petitioners whole premise that theirs is not a collateral attack on this decree is refuted by Ohio's Collective Bargaining Act, codified as Chapter 4117 of the Ohio Revised Code, which was passed in 1984 during the Williams litigation. Prior to the passage of the Act, Respondent City had had an extensive history of collective bargaining with its employees. The police officers were historically represented by the Fraternal Order of Police (FOP), Lodge #28.

As Judge Lambros finds in his July 13, 1989, Order Denying Petitioners' Motion for Emergency Temporary Restraining Order and

Findings of Fact and Conclusions of Law, FOP, Lodge #28 was granted intervention in the Williams case by Judge Lambros under Rule 24 of the Federal Rules of Procedure specifically because, "...the FOP claimed an interest in the litigation by virtue of its status as the collective bargaining representative for all Police [officers] within the City of Youngstown," Petitioners' Appendix 31. Judge Lambros goes on to find that, from the Williams docket (and probably his own personal recollection) the FOP at all times had been actively involved in the Williams litigation, going as far as to file an appeal of the 1986 consent decree, an appeal which was voluntarily dismissed by the FOP later that year. Further, the district court found that the FOP had been

actively involved in all proceedings in the Williams matter since that dismissal, including the settlement negotiations surrounding the 1989 promotions Petitioners attack herein. Judge Lambros specifically found that at these settlement negotiations the FOP ultimately acquiesced in the stipulated settlement that effected these promotions based not only on his personal knowledge and the Williams record, but also on Petitioners' own exhibit, an affidavit from then FOP president, William Blanchard, July 13, 1989, Order, Petitioners' App. 31-35.

In that affidavit, Exhibit 7 of Appellate R. 17, Blanchard admits that he was representing the police bargaining unit, that he attended not only the ultimate settlement hearing of June 12,

1989, but several others and that he participated in and agreed to the stipulated settlement that resulted in the promotions at issue herein.

Recognizing the implications of this, Petitioners have attempted to obfuscate the issue with a game of semantics. While the FOP, Lodge #28 was a party to the Williams case, say Petitioners, FOP, Lodge #28 Labor Council was not. This is untrue. For purposes of representation of the active members of the Youngstown Police Department, these entities are one and the same as a matter of law. The exclusive bargaining agent for police officers for many, many years in the City has been FOP, Lodge #28. When Ohio's Collective Bargaining Act was enacted in April 1984, FOP, Lodge #28 became a "deemed certified"

collective bargaining unit, see Ohio Revised Code, Section 4117.05. At some later date, the State Employment Relations Board (SERB) determined that, under the Act, municipal retirees could not remain in the same bargaining unit with active employees. Hence, the City of Youngstown's active FOP bargaining unit began calling itself FOP, Lodge #28, Labor Council for purposes of exclusive representation under Ohio Revised Code, Chapter 4117.

Under Rule 25 of the Federal Rules of Civil Procedure, a "public officer's" successor is automatically substituted as a party, whether or not there is a court order of substitution. By state law, FOP, Lodge #28, Labor Council was the automatic bargaining unit successor to the purely fraternal FOP, Lodge #28, which is made

up of police retirees. SERB recognizes this group as the same deemed certified unit that existed prior to 1984 by operation of law. The City and its legislative body recognized this group to be the same exclusive bargaining agent that existed prior to 1984. Wisely, Judge Lambros and the Sixth Circuit Court of Appeals also recognized this group to be the same exclusive bargaining agent made party to the Williams case in 1979. Blanchard himself admits that he represented the exclusive bargaining unit, that is, the working police officers who are and were the only persons affected by the consent decree. To now claim otherwise is foolish. The consent decree had no affect on retirees. Only active police officers had an interest in and were affected

by this decree. By operation of law in the Williams litigation and in the present matter, these FOP groups are one and the same.

Based on all the above, at all times and during all proceedings Petitioners had a "meaningful opportunity to appear" and be heard during consent decree settlement negotiations, especially the June 12, 1989, session that resulted in the promotion of minority officers over Petitioners. Intervention of their employee representative affected their own representation in the matter. Therefore, Petitioners lack standing to collaterally attack any issue involving the consent decree in a separate action.

Petitioners further attempt to obfuscate the issue of their standing to

bring suit at all by arguing that the Williams district court violated Ohio civil service law. While this argument, even if true, cannot correct their lack of standing in the stipulated settlement of the promotional scheme under the consent decree, the record in Williams establishes that this is not the case.

First, Petitioners argument that Ohio Revised Code §4117.09 was violated because there was no specific provision in the parties' collective bargaining agreement waiving civil service requirements in promotions completely ignores Ohio Revised Code §4117.10(A) which states that certain laws will prevail over collective bargaining agreements and among them are those dealing with civil rights. That said, no civil service laws were violated.

All parties agree that the decree requires candidates for promotion to achieve a passing score, said score to be determined by the City and the administrator of the validated exams. The record in Williams reflects that the City hired an outside entity for this and did not rely on the Youngstown Civil Service Commission or its own administrator. On June 12, 1989, all parties to the stipulated settlement including the FOP agreed, after consultation with this testing consultant, that all seventeen candidates to be promoted had attained a minimum passing score, see Petitioners' App. 34-35, paragraphs 15 and 16, Judge Lambros' Order Denying Plaintiffs' Motion for Temporary Restraining Order and Findings of Fact and Conclusions of Law.

Granted, this passing score was calculated at less than the 70% traditionally held by the Youngstown Civil Service Commission as a passing score.

Nowhere in the decree is a 70% score mandatory. There is absolutely no state law Petitioners can cite which sets passing civil service scores at seventy percent (70%), or at any other set level. Nowhere in the decree does it prohibit the City and its testing consultant from setting a higher or lower percentage as a passing score. Therefore, when a lower score was set as a passing grade, this in no way modified any portion of the decree or state civil service law.

At the most, this was an unusual deviation from local practice. As it was a

deviation that Petitioners' representative agreed to and acquiesced in, they may not attack the agreement or the promotions by means of a collateral action.

II. A writ of certiorari should not be granted where Petitioners do not have standing to challenge a consent decree as at all stages of the judicial proceedings involving the consent decree Petitioners had notice and a meaningful opportunity to be heard.

Respondent City fully reiterates its argument in the preceding issue and would further argue that Petitioners reliance on Martin v. Wilks, 490 U.S. 755 (1989), in an attempt to press forward with the claims of Simon and Dellick is misplaced.

Taking Wilks out of context, Petitioners argue that as Simon and Dellick were not themselves allowed to intervene in the Williams litigation, the stipulated settlement entered into to effect promotions under the decree cannot settle Simon and Dellick's claims. Again, Petitioners fail to understand that their interests, all of them, were adequately represented in the stipulated settlement by their elected employee representative, the FOP president. All named Petitioners are police officers represented by the FOP, Lodge #28 as concerns wages, hours and terms and conditions of employment or matters which "affect" wages, hours and terms and conditions of employment, see Ohio Revised Code Chapter 4117, especially

§4117.10(A). By operation of law under this Chapter, the FOP is Petitioners' exclusive representative on these matters. Therefore, regardless which Petitioners were individually named as intervenors and which may have been denied such status, each Petitioner was made a party through the bargaining agent FOP in compliance with Rule 24 of the Federal Rules of Civil Procedure and thus have no separate standing to collaterally attack the decree or its implementation.

III. A writ of certiorari should not be granted where Petitioners were adequately represented in a stipulated settlement agreement and the current matter amounts to

no more than an impermissible collateral attack on a valid consent decree.

Respondent City disputes that the consent decree was modified. As earlier argued, Petitioners would like to have the 70% rate of passage, a level that the local commission as a matter of policy had earlier been using, set into state statutory law. It is not. Even if it were, however, and even if the consent decree was impermissibly modified as Petitioners would like to have some court believe, it cannot save Petitioners' action herein as they lack standing to sue. Petitioners exclusive representative was a party to the Williams litigation, made appearances at every juncture and, most tellingly, attended settlement conferences

aimed at effecting and which ultimately did effect the very promotions Petitioners sought to stop here. By participating in the negotiations and admittedly agreeing to the promotional scheme utilized to make the complained-of promotions, Petitioners' exclusive representative effectively ended all further protests by Petitioners or any other police officer. Blanchard represented Petitioners in the agreement which lead to these disputed promotions. If Petitioners feel inadequately represented, their recourse, as Judge Lambros points out, is against their state-mandated bargaining representative. Their union president could have insisted on a hearing. Their union president could have filed objections with the district court. He did

not. Their union president had notice of all hearings and settlement negotiations and opportunity to be heard and, in fact, was heard. Their union president was heard to agree to proceed with promotions. Petitioners cannot now seek to sidestep this representative and attack the decree and its implementation. They are barred by law.

IV. A writ of certiorari should not be granted were, due to the facts of this specific case, Petitioners cannot show an independent cause of action.

Once again, Petitioners fail to recognize that, because they were FOP members and the FOP was a party to the

Williams litigation and agreed to implementation of the stipulated settlement as to promotions, they do not now have any independent claims. Once again, because Petitioners were intervenors through the FOP, their reliance on Wilks, supra, and United States v. Jefferson County, 720 F. 2d 1511 (11th Cir. 1983) is misplaced. The firefighters in Wilks had separate Title VII claims available to them precisely because they were not themselves joined as intervenors in the underlying suit that generated the Wilks decree.

Petitioners also overlook the fact that they, themselves, filed a motion for summary judgment herein. They, themselves, argued that they were entitled to judgment as a matter of law and that there were no

disputed facts. This being the case, Petitioners told the district court there was no factual issue to try. Once the district court accepted this admission by Petitioners, denied their summary judgment motion and granted that filed by Respondent City it was too late to change their position and claim entitlement to a trial of some of Petitioners' claims, claims which are inextricably tied to those raised in their prayer for injunctive relief.

V. A writ of certiorari should not be granted where, based on the facts of this specific matter, summary judgment was correctly granted Respondent City.

Petitioners claim that the district court abused its discretion in granting summary judgment to Respondent City. Again, it must be noted that it was Petitioners themselves who first filed for summary judgment herein and argued to the district court that there were no disputed facts so that the court could rule as a matter of law in this case. Once the court did just that, realizing their mistake in making such an admission, Petitioners are backpedalling before this honorable Court attempting to place a burden on Respondent to come forth with original evidence of its own or face trial on the issues. There is no such requirement in law.

True, Respondent used the FOP president's affidavit, a piece of evidence originally intended by Petitioners as beneficial to them, as its own evidence to support summary judgment in the City's favor. That affidavit was the only evidence needed to resolve the threshold question herein. If, pursuant to Wilks, supra, Petitioners were not adequately represented in the Williams matter, including the promotional stipulated settlement, the matter should go forward. If, however, Petitioners were fully and adequately represented in the Williams matter, regardless whether they like the ultimate outcome, they had no standing to attack the promotions at issue. The affidavit was dispositive. Mr. Blanchard

admitted that he represented Petitioners' as their bargaining agent and fully participated in the Williams matter, most especially the stipulated settlement that resulted in promotions. As a matter of law, then, directing this Court's attention to the earlier arguments involving Chapter 4117 of the Ohio Revised Code, Petitioners suit in its entirety failed. Respondent concurs in Petitioners' analysis of Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986). Anderson does not save Petitioners here.

CONCLUSION

Petitioners do not allege that the Sixth Circuit decision herein is in conflict with other circuits. Petitioners do not identify any special or important reasons for granting the writ. The decision of the lower courts is supported by and consistent with the Supreme Court and other controlling law. Petitioners rely heavily on Wilks, supra, in an attempt to argue that the decision is contrary to law. This reliance is misplaced. Factually, Wilks and the present matter are easily distinguishable in one important aspect: Petitioners herein were parties to the consent decree through their bargaining agent. As this matter falls squarely within the parameters of Wilks, there is no

issue or matter herein of great impact on development of the law. Indeed, reversal of this matter can solely impact on the parties herein and for this reason alone the Petitioners should be dismissed and the Writ not granted. At no point do Petitioners concisely state their constitutional claims, the facts on which these are based, and, importantly, Petitioners can cite to no cases or statutes which provide them with a basis in law for their claims. For all of the foregoing, Respondent City respectfully requests this honorable Court dismiss the Petition herein.

Respectfully submitted,

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